

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP83-CR

Cir. Ct. No. 2004CF45

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN J. JOHANSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dean Johansen appeals a judgment convicting him of two counts of repeated sexual assault of the same child and imposing concurrent sentences of thirty years' initial confinement and fifteen years' extended supervision. He also appeals an order denying his postconviction motion

to reduce the sentences. He argues that the trial court's assessment of his risk of reoffending was not supported by any evidence, and that a report by Dr. Dianne Lytton established that Johansen had a "very minimal" risk to recidivate by age sixty, justifying at least a two-year reduction in the initial confinement. We reject these arguments and affirm the judgment and order.

¶2 Johansen was initially charged with four counts of repeated sexual assault of the same child in Taylor County. Pursuant to a plea agreement, Johansen pled no contest to two counts. The other two counts and two counts of the same offense from Marathon County were dismissed and read in for sentencing purposes. The offenses involved thirty-five to forty-five acts of sexual conduct or intercourse with a child over a period of three years, beginning when the child was eleven years old and culminating when she became pregnant.

¶3 The presentence investigation report included a psychological assessment from Dr. Jonathan Snider, who opined that Johansen was in the low to medium category of risk, meaning a twenty-one percent likelihood of reoffending. The victim's mother, Shannon, testified that she believed Johansen victimized her daughter to punish or "get at" Shannon. The sentencing court stated that it sought to be "assured" that Johansen would not reoffend and needed to protect the public because Johansen "will potentially prey on young vulnerable girls again if he has the opportunity." The court imposed the thirty-year term of initial confinement based on its assessment that Johansen should be incarcerated until he is sixty-two years old, "a point in [his] life where I am satisfied [he is] less likely to be able to commit these crimes"

¶4 The court was not required to base its sentence on Snider's risk assessment for several reasons. First, the trier of fact is entitled to accept or

disregard expert testimony. See *State v. Slagoski*, 2001 WI App 112, ¶9, 244 Wis. 2d 49, 629 N.W.2d 50. Second, while actuarial tests and assessments of probable recidivism may be relevant, they do not control the sentencing court's decision. The court is not required to subject future victims to any risk. Third, in addition to considering the need to protect the public, the court also based the sentence on a need for retribution and general deterrence, noting that Johansen brutalized the child thirty-five to forty-five times.¹ Fourth, the court noted Johansen's dangerously self-indulgent attitude and the possibility that he victimized the child to punish her mother, a motivation that may not be common among a random sample of men who sexually offend against young girls. Based on these considerations, the trial court properly sentenced Johansen regardless of Snider's statements on other offenders' rates of recidivism.

¶5 At the postconviction hearing, Lytton testified that Snider erroneously scored Johansen's tests. Her actuarial assessment placed Johansen at a "low risk category to sexually reoffend." She also testified that Johansen's risk of reoffending would become "very minimal" by age sixty, two years before expiration of the initial confinement portion of his sentence. Johansen contends that Lytton's testimony establishes a new factor justifying a reduction of the sentence. We disagree.

¹ Johansen interprets the court's comment as stating a false belief that the number of offenses is predictive of the likelihood of reoffending. The trial court's comments on the number of offenses were not necessarily tied to its belief that Johansen would reoffend. Rather, the transcripts supports an interpretation that the trial court considered the number of offenses and independent aggravating circumstance that underscored the seriousness of the offense, Johansen's character and the need for retribution.

¶6 A “new factor” is a fact highly relevant to the imposition of sentence, unknown to the sentencing court either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *State v. Michels*, 150 Wis. 2d 94, 96, 441 N.W.2d 278 (Ct. App. 1989). It must be an event or development that frustrates the purpose of the original sentence, something that strikes at the very purpose for the sentence selected by the trial court. *Id.* at 99. Here, the sentencing court indicated that it gave no weight to Snider’s actuarial assessment of Johansen’s risk to sexually reoffend. Therefore, any correction of Snider’s scoring was not highly relevant to the sentence and did not frustrate the court’s sentencing intent. Johansen was not sentenced on the basis of false information because the court did not rely on Snider’s report. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Furthermore, the court indicated that even if Lytton’s evidence constituted a new factor, the court would not reduce Johansen’s sentence. Even if only a small percentage of offenders in Johansen’s position reoffend, particularly as they grow older, the court reasonably chose to minimize the risk and to emphasize retribution and deterrence rather than solely rely on Johansen’s likelihood to reoffend.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

